UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 19

WILDFLOWER COURT, INC.

Employer

And Case 19-RC-14607

INTERNATIONAL BROTHERHOOD OF TEAMSTERS, GENERAL TEAMSTERS UNION LOCAL 959, AFL-CIO

Petitioner

REGIONAL DIRECTOR'S DECISION AND DIRECTION OF ELECTION

Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, as amended, a hearing was held before a hearing officer of the National Labor Relations Board, hereinafter referred to as the Board. Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated its authority in this proceeding to the undersigned. Upon the entire record[1] in this proceeding, the undersigned makes the following findings and conclusions.[2]

SUMMARY

The Petitioner filed the instant petition seeking a unit of all of the Employer's employees located at its Juneau, Alaska facility, some 100 employees. At hearing, the Parties stipulated to the appropriateness of two separate units of employees: a unit of professional employees that includes the Employer's registered nurses (RNs), physical therapists and occupational therapists (the "A" Unit);[3] and a second unit of all other employees, excluding confidential employees, guards and supervisors as defined in the Act (the "B" Unit).[4] A hearing was conducted on November 18 and 19, 2004. On

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[1] The Employer and Petitioner timely filed their respective briefs, which were duly considered.

[2] The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed. The Employer is engaged in commerce within the meaning of the Act and it will effectuate the purposes of the Act to assert jurisdiction herein. The labor organization involved claims to represent certain employees of the Employer and a question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.

[3] The Parties stipulated to the professional status of the employees in Unit "A".

[4] Those employees identified in the second or "B" Unit are the Employer's licensed practical nurses, certified nursing assistants, payroll technicians, accounting technicians, staffing coordinators, health information technicians, ward clerks, social and human services assistants, bath aides, activity aides, restorative aids, laundry aides, maintenance/janitors/home attendants,

December 3, 2004, I issued an Order Reopening Record and Remanding Proceeding and Notice of Representation Hearing (Remand) for the limited purpose of taking additional evidence on the contested issue of the RN's alleged supervisory status. Following the Remand, the Petitioner requested to withdraw the portion of its petition with regard to Unit A, thereby leaving Unit B as the unit in which Petitioner wishes to proceed to an election. On December 7, 2004, I approved the Petitioner's request for partial withdrawal and closed the hearing in this case.

The record and briefs in this case disclose that the parties are in substantial agreement regarding the scope and appropriateness of Unit B (Unit). Their sole disagreement is over the unit status and/or voter eligibility of on-call certified nurses aides (CNAs). The Employer apparently would exclude the on-call CNAs based on the applicability of the voter eligibility formula set forth in *Marquette General Hospital, Inc*. 218 NLRB 713 (1975). Petitioner argues that the on-call CNAs' eligibility should be determined in line with the Board's standard eligibility formula or, where warranted, in line with the Board's recent decision in *Arlington Masonry Supply, Inc*. 339 NLRB No. 99 (2003). Based on the parties' arguments, briefs, and the record as a whole, I find that the on-call CNAs should be included in the unit and their voter eligibility determined in line with the Board law discussed below.

Below, I have set forth a section dealing with the evidence, as revealed by the record in this matter. Following the Evidence section is my analysis of the applicable legal standards in this case, conclusion, and my decision and direction of election.

I.) EVIDENCE

The Employer is a State of Alaska non-profit charitable corporation with a nursing home complex located in Juneau Alaska, where it is engaged in the business of providing long term nursing care services to the public.[5] The Employer utilizes three nursing "homes" within its Juneau facility where it provides its services. In all, the Employer employs approximately 100 employees and services a maximum of 49 residents. About 90 of those employees make up Unit B.

The Employer provides long-term nursing home services 24 hours a day, 7 days a week at its facility. The Employer is currently at its maximum capacity of 49 residents.

The Employer's staffing coordinator contacts the Employer's on-call employees (RNs and CNAs) regarding their availability to come in and work for the Employer. The on-call employees will also contact the staffing coordinator to advise her of their availability and/or to solicit work. The record reveals that the on-call employees are not required to accept on-call assignments when initially offered by the Employer but once accepted, the on-call employee is obligated to show for work. The record further reveals that, unlike unit employees, on-call employees do not, at least initially, receive benefits[6] and on-call employees work on an "as needed basis" rather than on "predetermined

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home attendants, home attendants/janitors, janitors, lead janitors, inventory supply clerks, maintenance mechanics, and lead maintenance mechanics.

[5] The non-acute health care nature of the Employer's operation is not at issue.

[6] However, an Employer witness testified that on-call employees do receive benefits after they work a certain number of hours. That certain number of hours was not set forth in the record.

schedule." On-call CNAs are subject to the same supervision, perform similar work, and are subject to the same rules of work as full-time Unit employees.

CNAs' wages start between $14.33 an hour and $15.21 an hour depending on experience. The Employer did not provide the rate of pay for the on-call CNAs. RNs, LPNs and CNAs use the same time clock to punch into and out of work.

At the time of the hearing the Employer employed seven on-call CNAs: Kimberly Peterson; Naty Jose; Arlene Wales, Janise Maka, Christina Gallentes, Natalie Martin, Demy Carandang; and Rene McDonald.

Peterson resigned her full-time position with the Employer on May 17, 2004, and at the same time requested to be placed in on-call status beginning in September. Since her return in September as an on-call employee, Peterson has worked 137.25 hours over the ensuing 8 weeks for the Employer.

Jose took leave, in writing, commencing on October 3, 2004, through November 9 of this year to attend her ailing husband's mother's funeral and estate in the Philippines. Since returning from leave on November 9, 2004, Jose has worked one shift for the Employer. Nothing in Jose's leave letter indicates that she had intended to resign.

Wales resigned her employment with the Employer in a letter dated October 22, 2004. In the letter, Wales says nothing about requesting to be placed in on-call status. However, an Employer witness testified that Wales has requested to be placed in on-call status. Wales has not worked any hours since her resignation.

Maka and Gallantes were full-time employees of the Employer but resigned their employment in late July 2004 to return to school. Maka recently worked some on-call shifts for the Employer sometime shortly before the hearing in this case. Gallantes had not worked any on-call hours at the time of the hearing in this case. Regardless, both Maka and Gallentes have recently requested on-call hours, particularly for the upcoming holidays when the Employer historically has had a relatively significant amount of on-call work available.

Martin has been employed in the Employer's on-call pool for quite some time and, thus, she has in excess of 200 hours over the period of April 18, 2004, through October 30, 2004.

Carandang and McDonald were recently hired by the Employer as on-call employees. Carandang has worked over 128 hours during 6 week period ending October 30, 2004, while McDonald has worked four shifts during a recent pay period (2 weeks) at or about the time of the hearing in this case.

II. ANALYSIS

While it is not abundantly clear from the record or the Employer's brief, it would appear that the Employer argues that the on-call CNAs should be excluded from the Unit if they fail to meet the voter eligibility requirements set forth in *Marquette General Hospital Inc.*, supra. The Petitioner argues the on-call CNAs are properly included in the Unit and are eligible to vote under the Board's recent decision in *Arlington*, supra.

In determining whether on-call employees should be included in a unit, the Board considers the similarity of the work performed and the regularity and continuity of employment. *Trump Taj Mahal Casino*, 306 NLRB 294, 295 (1992), enfd. 2 F.3d 35 (3d Cir. 1993); *Arlington Masonry Supply, Inc*. 339 NLRB No. 99 (2003). With regard to the similarity of work, in the instant case it is undisputed that the on-call CNAs perform the same duties under the same conditions and supervision as the full-time CNAs. With regard to regularity, the Board finds this requirement is met when an employee has worked a substantial number of hours within the period of employment prior to the eligibility date. *Arlington Masonry Supply, Inc.*, supra. Under its most widely used test, the Board has held that, absent special circumstances, an on-call employee has sufficient regularity of employment if the employee averages 4 or more hours/week for the last quarter prior to the eligibility date. *Davison-Paxon Co*., supra. In *Marquette General Hospital*, supra, the Board utilized an eligibility formula that required employees to have worked a minimum of 120 hours in either of the two quarters immediately preceding the eligibility date. The Board employed this formula because of the significant disparity in the number of hours worked by the employer's on-call nurses; some worked as many as 540.5 hours per quarter, and some as few as 23. The more restrictive formula allowed the Board to distinguish those on-call nurses whose work patterns more closely resemble full-time nurses from those who worked relatively infrequently.

However, regarding circumstances in which an employee is hired during the quarter preceding the eligibility date, the Board in *Arlington Masonry Supply, Inc.,* stated:

> "... the Board has sometimes calculated the employee's hours from the hire date up until the *election date*, as opposed to the eligibility date. For example, in *Stockham Valve & Fittings, Inc.,* 222 NLRB 217 (1976), the Board found that the two part-time employees, who began working 1 month prior to the election, individually worked sufficient hours to be eligible to vote in the election. The Board calculated their work hours from their *hire date up until the election date*." Under that calculation, they each worked at least 4 hours per week on average, enough to make them eligible to vote in the election.

Here, the Employer contends there is a wide disparity where some employees have worked in excess of 200 hours and other have worked no hours. However, the hours cited by the Employer in this regard cover varying periods. Moreover, some of the CNAs were former full-time employees who relatively recently sought placement into on-call status and others are new employees recently assigned on-call shifts. Another issue arises with regard to employee Jose who never resigned her full-time position; rather, she sought an extended leave of absence to attend a family funeral in the Philippines.[7] In these circumstances, I find that the *Davison-Paxon* eligibility formula[8] is more appropriate for those employees hired into on-call status for more than a quarter prior to the election eligibility date described below in the Direction of Election section. With respect to the Employer's recent hires into on-call status during the quarter preceding

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[7] Calculation of the regularity of employment does not include periods of approved leave. Pat's Blue Ribbons and Trophies, 286 NLRB 918 (1987).

[8] Under the *Davison-Paxon,* supra, any on-call employee who regularly averages 4 hours or more per week for the last quarter prior to the eligibility date has sufficient community of interest for inclusion in the unit and may vote in the election.

the eligibility date, I find that the appropriate eligibility formula is that which is set forth in *Stockham Valve & Fittings*, supra; namely, employees averaging 4 hours a week during the period of the recent hire's hire date and the date of the election. Because the *Stockham Valve & Fitting* formula covers a period up to the date of the election, I shall permit new on-call employees in the petitioned for unit to vote subject to challenge.

III.) CONCLUSION

In view of the record evidence, I shall direct an election in the following appropriate Unit:

> All regular full-time and part-time employees employed by the Employer at its Juneau, Alaska facility; excluding all professional employees, confidential employees, guards, and supervisors as defined in the Act.
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> There are approximately 90 employees in the Unit found appropriate.

IV.) DIRECTION OF ELECTION

An election by secret ballot shall be conducted by the undersigned among the employees in the Unit found appropriate at the time and place set forth in the notice of election to be issued subsequently, subject to the Board's Rules and Regulations. Eligible to vote are those in the Unit who were employed during the payroll period ending immediately preceding the date of this Decision, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Employees engaged in any economic strike, who have retained their status as strikers and who have not been permanently replaced are also eligible to vote. In addition, in an economic strike, which commenced less than 12 months before the election date, employees engaged in such strike who have retained their status as strikers but who have been permanently replaced, as well as their replacements are eligible to vote. Those in the military services of the United States may vote if they appear in person at the polls. Ineligible to vote are employees who have quit or been discharged for cause since the designated payroll period, employees engaged in a strike who have been discharged for cause since the commencement thereof and who have not been rehired or reinstated before the election date, and employees engaged in an economic strike which commenced more than 12 months before the election date and who have been permanently replaced. Those eligible shall vote whether or not they desire to be represented for collective bargaining purposes by INTERNATIONAL BROTHERHOOD OF TEAMSTERS, GENERAL TEAMSTERS UNION LOCAL 959, AFL-CIO.

A.) List of Voters

In order to assure that all eligible voters may have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to a list of voters and their addresses that may be used to communicate with them. *Excelsior Underwear*, 156 NLRB 1236 (1966); *NLRB v. Wyman-Gordon Co*., 394 U.S. 759 (1969). Accordingly, it is hereby directed that an election eligibility list, containing the alphabetized full names and addresses of all the eligible voters, must be filed by the Employer with the Regional Director for Region 19 within 7 days of the date of this Decision and Direction of Election. *North Macon Health Care Facility*, 315 NLRB 359, 361 (1994). The list must be of sufficiently large type to be

clearly legible. The Region shall, in turn, make the list available to all parties to the election.

In order to be timely filed, such list must be received in the Regional Office, 915 Second Avenue, 29th Floor, Seattle, Washington 98174, on or before December 15, 2004**.** No extension of time to file this list may be granted except in extraordinary circumstances, nor shall the filing of a request for review operate to stay the filing of such list. Failure to comply with this requirement shall be grounds for setting aside the election whenever proper objections are filed. The list may be submitted by facsimile transmission to (206) 220-6305. Since the list is to be made available to all parties to the election, please furnish a total of 4 copies, unless the list is submitted by facsimile, in which case only one copy need be submitted.

B.) Notice of Posting Obligations

According to Section 103.20 of the Board's Rules and Regulations, the Employer must post the Notices to Election provided by the Board in areas conspicuous to potential voters for a minimum of 3 working days prior to the date of the election. Failure to follow the posting requirement may result in additional litigation if proper objections to the election are filed. Section 103.20(c) requires an employer to notify the Board at least 5 full working days prior to 12:01 a.m. of the day of the election if it has not received copies of the election notice. *Club Demonstration Services*, 317 NLRB 349 (1995). Failure to do so estops employers from filing objections based on nonposting of the election notice.

C.) Right to Request Review

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14th Street, N.W., Washington, D.C. 20570-0001. This request must be received by the Board in Washington, D.C. by 5 p.m., EST on December 22, 2004**.** The request may **not** be filed by facsimile.

DATED at Seattle, Washington this 8th day of December 2004.

/s/ Richard L. Ahearn
Richard L. Ahearn, Regional Director
National Labor Relations Board, Region 19
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